90-767

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-

In the Supreme Court of the United States of America

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prior restraint against telecasting tapes of conversations by a criminal defendant with his legal defense team is inconsistent with the First and Fifth Amendments?

2. Whether the District Court violated petitioners' rights under the First Amendment by requiring petitioners to prove the tapes they possessed did not contain information prejudicial to the defendant?

3. Whether the prior restraint entered in this case was unconstitutionally vague in violation of the First and Fifth Amendments?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Cable News Network, Inc., and Turner Broadcasting System, Inc.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United*

[1] Petitioner Cable News Network, Inc., is a wholly-owned subsidiary of petitioner Turner Broadcasting System, Inc. *See* Rule 29.1. Throughout this Petition, the petitioners will be collectively referred to as "CNN."

States v. Noriega, Nos. 90-5926, 90-5927, and 90-5932, on November 10, 1990.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, issued on November 10, 1990, has not yet been reported. It is reprinted in the Appendix hereto, at pages 1a-17a. The decisions of the United States District Court for the Southern District of Florida issued on November 8 and November 9, 1990, have not been reported. They are reprinted in the Appendix hereto, respectively, at pages 19a and 25a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 10, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which grants power to review all "[c]ases in" the courts of appeals. *Nixon v. Fitzgerald*, 457 U.S. 731, 741 (1982).

This case was properly "in" the Court of Appeals as an appeal from an order granting a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).[2] Although the District Court

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[2] The District Court had jurisdiction as a result of the United States Government's prosecution of Noriega, the former Panamanian leader, for drug conspiracy charges. The *Noriega* case, in which the defendant was located and apprehended by United States armed forces during the invasion of Panama in December, 1989, has been the subject of several District Court decisions. *See United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. Oct. 9, 1990) (1990 Westlaw 156552); *United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. Sept. 24, 1990) (1990 Westlaw 142524); *United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. June 14, 1990) (1990 Westlaw 95529); *United States v. Noriega*, No. 89-0079-CR-Hoeveler (S.D. Fla June 8, 1990) (1990 Westlaw 156541); *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988); *United States v. Noriega*,

has at times characterized the prior restraint appealed from as a temporary restraining order, which as a general rule is not appealable under Section 1292(a)(1), the prior restraint is appealable under that section pursuant to *Sampson v. Murray*, 415 U.S. 61 (1974), a case almost on all fours with this one.

The district court in *Sampson* entered a temporary restraining order granting injunctive relief until the defendant produced a witness to testify, which the defendant refused to do. *Id.* at 66-67 & 67 n.8. After observing that the order's designation as a temporary restraining order could not shield it from appellate review, *Sampson* held that because the order extended beyond the ten-day period allowed by Fed. R. Civ. P. 65(b), an "adversary hearing" had been held on the matter, and the court's basis for issuing the TRO had been "strongly challenged," the order should be treated as an appealable preliminary injunction. *Id.* at 86-87. In this case, although the District Court's Order had for a time a nominal life of ten days, it has now been indefinitely extended, and this Court can rule on this Petition for Certiorari.[3] Moreover, the District Court held an adversary hearing on the matter, and its ruling is strongly challenged by CNN. The orders thus are appealable under Section 1292(a)(1).

The District Court's orders are appealable for the further reason that they cause petitioners ongoing irreparable harm by infringing their First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975). The courts and commentators recognize that a temporary restraining order is appealable when it will do irreparable harm. *E.g., San Fran-*

No. 88-0079-CR-Hoeveler (S.D. Fla. Feb. 4, 1988) (1988 Westlaw 168666).

[3] This was further confirmed in a hearing before the District Court on November 13, 1990. A transcript of this hearing is in preparation and will be included in a Supplemental Appendix.

cisco Real Estate Investors v. Real Estate Inv. Trust, 692 F.2d 814, 816-17 (1st Cir. 1982); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice & Procedure* § 3922 at 37-38 (1977); *see also Sampson*, 415 U.S. at 86 n.58, *quoting Pan American World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962) (appeals are permitted under § 1292(a)(1) because of " 'the possibility of drastic consequences which cannot later be corrected' ").

Alternatively, if the District Court's orders were not appealable under Section 1292(a)(1), this case was properly "in" the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a). The Court of Appeals was well within its discretion in treating petitioners' notice of appeals as a petition for a writ of mandamus.[4] This Court's certiorari jurisdiction extends to orders of the courts of appeal denying writs of mandamus. *E.g., Mallard v. United States District Court*, 109 S. Ct. 1814 (1989).[5]

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[4] The courts of appeal routinely treat notices of appeal as petitions for writs of mandamus. *E.g., In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970); *Seguros Banvenez S.A. v. S/S Oliver Drescher*, 715 F.2d 54, 56 n.1 (2d Cir. 1983); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987).

[5] If the District Court's orders are not reviewable under § 1292(a)(1), this was an appropriate case for the issuance of a writ of mandamus. The District Court's granting of a prior restraint, as shown below, constitutes the sort of " 'clear abuse of discretion,' " *Mallard v. United States District Court*, 109 S. Ct. at 1822, that justifies issuance of the writ. Moreover, if the orders are not reviewable on appeal, petitioners have no alternative means of relief, making mandamus appropriate. *Id.* Finally, as in *Mallard*, the "principal reasons" for not using the writ — "the undesirability of making a district court judge a litigant, and the inefficiency of piecemeal appellate review," *id.* — are not present. The courts of appeal recognize that mandamus is the appropriate remedy for a prior restraint, *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), and for other violations of the First Amendment. *E.g., Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988); *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

First Amendment

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case arose from CNN's investigation of possible Government misconduct in the highly newsworthy prosecution of General Manuel Antonio Noriega.

A. CNN's Investigation and Broadcast.

CNN's investigation began when it learned that the Government might be taping telephone conversations made by Noriega from his prison cell, including tapes that appeared to show that the Government had recorded communications between Noriega and members of his defense team. App. 57a. CNN then interviewed, for later telecast, a legal expert who described the impact of such recordings on Noriega's rights. The Government declined to comment on the tapes then, and it continues to decline comment on them. CNN obtained an interview in which Noriega's counsel first played a tape of attorney-client communications, confirmed they were such communications, and then played the tape again on camera. After that interview, CNN telecast its story at approximately 7:00 a.m., E.S.T., on November 8, 1990. App. 57a-70a. The listener could hear the sounds of the conversation between Noriega and his defense team in the telecast, but could not discern the words making up the conversation. App. 4a.

B. Proceedings Below.

After learning of CNN's likely telecast of the tapes, Noriega moved to enjoin CNN from broadcasting any illegally recorded telephone conversations containing privileged attorney-client communications. App. 30a. The District Court heard argument on Noriega's motion on November 8, 1990, after the first CNN telecast. While CNN vigorously opposed the motion on First Amendment grounds, the Government took no position on it.

The District Court considered whether it ought to review the taped conversations before ruling on the motion, but Noriega's lawyer replied that such a review would not be meaningful unless he disclosed his "entire defense strategy," which he refused to do. App. 81a. The District Court thereupon requested that CNN agree not to telecast any tapes pending its ruling. When CNN declined that request, the District Court issued its prior restraint by orally ordering CNN not to telecast attorney-client privileged tapes pending its ruling. When CNN's counsel asked for clarification of the order, the Court made clear that the order did not apply to "tapes that don't have anything to do with the attorney/client situation . . . . " App. 23a, 83a.

Later that day the District Court issued a written order (the "Order"), which continued what it called the "temporary injunction" barring telecast of the tapes until the court could review them, and directed CNN to produce the tapes to the court. App. 23a-24a. CNN consistently has opposed producing the tapes on First Amendment grounds. App. 94a. In an oral ruling, however, the District Court stayed the portion of the

Order directing CNN to produce the tapes; that stay remains in effect. App. 87a.[6]

The next day, November 9, 1990, the District Court issued a supplemental written order (the "Supplemental Order") holding that its prior restraint, which it now called a temporary restraining order, would remain in effect for up to ten days, or such lesser time as needed by the court to review the tapes and reach a decision on the merits. Although the District Court acknowledged that, contrary to the test for a prior restraint, "no clear and immediate harm is apparent," it restrained CNN because it found it "fundamentally unfair" for CNN to benefit from not producing tapes and thus to preclude the court from "knowing the precise contents of the speech sought to be restrained." App. 26a, 28a-29a. The District Court at the same time orally indicated that its oral stay of the Order compelling production of tapes remained in effect. App. 96a-97a.

CNN telecast a report including the tape at 6:30 p.m., E.S.T., November 9, 1990. CNN believed that the tape it had previously played to Mr. Rubino was no longer subject to the attorney-client privilege and thus that telecast of the tape was not prohibited by the District Court's orders, relying on first amendment protections and that belief.

The District Court held further proceedings the next day, November 10, after Noriega moved for a finding of contempt against CNN based on a telecast of November 9. App. 103a-107a. Subsequently, that contempt proceeding was stayed pending this Court's review. App. 136a. Although the District Court and Court of Appeals apparently believed that CNN was in contempt, CNN will contest any renewed motion for contempt, in part because CNN contends it did not telecast

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[6] Because this part of the Order had been stayed, the Court of Appeals erred in implying that CNN had willfully refused to produce the tapes in violation of the District Court's Order. App. 16a.

attorney-client privileged communications in violation of the Order.[7]

CNN filed a notice of appeal and an emergency motion for reversal and stay with the United States Court of Appeals for the Eleventh Circuit on November 8, 1990, after the District Court delivered its initial oral ruling, App. 37a-43a, and supplemented them on November 9 with notices of appeal and motions to stay and reverse the order and supplemental order of the District Court. App. 44a-53a. The Court of Appeals ordered Noriega and the Government to file responsive briefs by November 10.

In an order filed November 10, 1990, the Court of Appeals rejected CNN's motion for oral argument, dismissed CNN's notices of appeal, and, treating the notices of appeal as petitions for a writ of mandamus, refused to grant the writ and denied the motions for stay. App. 2a.

Subsequent to the action by the Court of Appeals, the District Court on November 12 and 13, 1990, entered orders extending the prior restraint until the Court rules on this Petition for Certiorari. App. 124a.

REASONS FOR GRANTING THE WRIT

This case involves an unprecedented prior restraint on publication, "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976). The District Court ordered CNN not to telecast information that it had obtained as a result of its investigation about possible Government misconduct in the

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[7] The Court of Appeals indicated that it had "been advised that CNN, in disregard and defiance of the District Court's explicit restraining order, broadcast . . ." App. 5a. This observation was made without a finding in the record, and CNN contests it.

criminal prosecution of the former ruler of Panama, who was seized and brought to the United States as a result of an American invasion of Panama in December, 1989.

In upholding the District Court's injunction against CNN's telecast of news, the Court of Appeals refused to apply this Court's decisions governing the propriety of prior restraints. Consequently, the decision of the Court of Appeals stands in direct conflict with *Nebraska Press* and the other prior restraint decisions of this Court and of other federal and state appellate courts. For these reasons and because of the important public and constitutional law issues involved, this Court should exercise its discretion under Rule 10.1(a) and (c) and grant a writ of certiorari to review the decision below.

I.

THE DECISION BELOW IS CONTRARY TO *NEBRASKA PRESS* AND OTHER DECISIONS OF THIS COURT AND REJECTS THIS COURT'S PRIOR RESTRAINT JURISPRUDENCE BY PERMITTING THE DISTRICT COURT TO ENJOIN CNN'S TELECAST FOR SPECULATIVE REASONS

The District Court and the Court of Appeals made two fundamental errors of law in issuing and upholding the injunction against CNN's telecast of the Noriega tapes. First, the District Court turned the principles of *Nebraska Press* upside down by issuing a prior restraint premised upon nothing more than conjecture of possible harm and by demanding that CNN come forward with evidence to disprove Noriega's right to ban CNN's telecast. Second, the Court of Appeals upheld the prior restraint by adopting a First Amendment test that is contrary to the standards required by *Nebraska Press* and other First Amendment decisions of this Court.

A. This Court's Decisions Emphasize That Prior Restraints are Presumptively Unconstitutional and that a Party Seeking a Prior Restraint Bears a "Heavy Burden" of Proof.

As both the District Court and Court of Appeals admitted, the injunctions against CNN are a form of prior restraint, "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press*, 427 U.S. at 562. For almost sixty years, the Court has stressed the presumptive unconstitutionality of prior restraints and has held that they may issue only on a clear and unequivocal showing.

In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court rejected a prior restraint against an anti-Semitic publication that disturbed the "public peace" and provoked "assaults and the commission of crime," emphasizing that such orders should be granted only in "exceptional cases." *Id.* at 716. In discussing those categories of cases, Chief Justice Hughes suggested that prior restraints might be granted only in circumstances such as a threatened publication of the sailing dates of transports or the number and location of troops in time of war. *Id.*; *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[i]n order to be held lawful, [the circumstances] first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints").

Four decades later, in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), the Court rejected requests for prior restraints against the publication of the Pentagon Papers, which were alleged to have been stolen from the government, and to contain highly sensitive national security

information. Particularly apposite to CNN's news coverage here, Justices Douglas and Black pointed out that:

> [t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.

Id. at 723-24 (Black, J., with Douglas, J., concurring).

Because of this "dominant purpose," the Court in *New York Times* emphasized the " 'heavy presumption against [the] constitutional validity' " of prior restraints, *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)), and imposed " 'a heavy burden of showing justification for [their] imposition.' " *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *see Southeastern Promotions, Ltd.*, 420 U.S. at 559 ("The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties.").

In *Nebraska Press Ass'n v. Stuart, supra*, the Court rejected a prior restraint in a criminal case involving a claim of prejudice to fair trial rights far more compelling than that asserted here. The suppressed information in *Nebraska Press* included the defendant's confession to the crime itself; the trial was to be held in a small, rural community. Noting that the primary purpose of the First Amendment is to prevent prior restraints and relying upon the "heavy presumption against constitutional validity," the Court vacated the gag order, observing that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment Rights." 427 U.S. at 559. *Nebraska Press* emphasizes that "the protection against prior restraints should have particular force as applied to reporting of criminal proceedings." *Id.*

Based on these considerations, *Nebraska Press* outlined an exacting test for issuance of prior restraints in the context of criminal proceedings and emphasized that a prior restraint should issue only if it is

> clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.

Id. at 569.

B. Both the District Court and the Court of Appeals Adopted Legal Standards at Odds With This Court's Prior Restraint Cases.

The courts below departed from this Court's prior restraint authorities.

1. The Court of Appeals Wholly Ignored This Court's Prior Restraint Cases in Fashioning Its Test for Upholding the Injunction Below.

In reviewing and upholding the District Court's rulings, the Court of Appeals flatly rejected fifty-nine years of unbroken United States Supreme Court precedent. Rather than apply the exacting standards required by *Nebraska Press* and other prior restraint decisions of this Court, the Court of Appeals constructed a weaker constitutional test, fashioned from the Court's "access" cases, and then determined that the gag order imposed on CNN was not unconstitutional because it met the lower burden of proof imposed by that test. This Court has repeatedly held, however, that the right of the press to be free from prior restraints is distinct from, and to be accorded

stronger protection than, the media's right of access to governmental information.[8]

In its decision, the Court of Appeals ignored this Court's prior restraint cases. Instead, the Court of Appeals erroneously analyzed the issue as a question of the media's right of access to information about the *Noriega* case.[9] The Court of Appeals cited this Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978), which concerned broadcasters' efforts to obtain access to copies of the Nixon tapes. App. 9a. Then, the Court of Appeals reasoned that since the "general public" has no "right to communications between a defendant and his counsel," and since the media are entitled to "no more information than the public," the District Court could appropriately issue a prior restraint prohibiting CNN from telecasting information it already possessed.

As a result of this fundamental legal error, the Court of Appeals' analysis mistakenly focused on the defendant's Sixth Amendment right to a fair trial, which it therefore determined was the District Court's "primary responsibility," App. 7a, without equal consideration of the right to be free from prior

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[8] In a prior restraint case, a court or other government official is attempting to prohibit the media from disseminating or publishing information the media have already obtained. In an access case, the newspaper or telecaster is attempting to obtain information that is in the government's possession.

[9] The court also ignored the factual record that was presented to it when it ruled, without benefit of any District Court determinations, that CNN had in fact "broadcast" certain information "in disregard and defiance of the District Court's explicit restraining order." App. 5a, n.5. As a result of this incorrect conclusion, the Court of Appeals criticized CNN for allegedly "appealing to our nation's judicial system for relief" while it was "at the same time defiant of that system's reasonable directions." App. 16a. In fact, contempt proceedings were later initiated, but they have been stayed, and CNN will contest any allegation of contempt, in part on the basis that it did not violate the Order by telecasting privileged attorney-client communications. App. 106a.

restraint under the First Amendment. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 399 (1979) (applying access analysis). The court's test thus diminished CNN's First Amendment interests and gave unnecessary weight to the concerns advanced by Noriega. As the Court of Appeals concluded, "'[i]t is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury'." App. 10a (*quoting Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981)).

This reasoning directly conflicts with the decisions of this Court, which have repeatedly stressed the significant distinction between the level of judicial inquiry required in determining a First Amendment "right to access" and the exacting standards which are applied in determining the constitutional validity of a "prior restraint."[10] By confusing the two, the Court of Appeals completely disregarded the commands of *Nebraska Press*, *New York Times*, *Near*, and similar cases.[11]

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[10] Very different concerns animate the two types of cases. As the Court noted in *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), "the right to speak and publish does not carry with it the unrestrained right to gather information." According to the late Professor Bickel:

> Prior restraints fall on speech with a brutality and a finality of their own. Even if they are ultimately lifted they cause irremediable loss — a loss in the immediacy, the impact of speech .... A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

A. Bickel, *The Morality of Consent* 61 (1975). *See also Nebraska Press* 427 U.S. at 609; T. Emerson, *The System of Freedom of Expression* 506 (1970).

[11] The Court of Appeals also misapplied its own case law. In *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), cited by the court in support of the prior restraint in this case, App. 8a, the Fifth Circuit (whose precedent is binding on the Eleventh Circuit) denied newspapers and their report-

This Court first noted the significant constitutional distinction between "right of access" and "prior restraint" in *Pell v. Procunier*, 417 U.S. 817 (1974), when it stated:

> It is one thing to say that ... government cannot restrain the publication of news .... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.

Id. at 834 (citations omitted).

Similarly, in *Gannett Co. v. DePasquale*, *supra*, which was relied upon by the Court of Appeals in upholding the prior restraint against CNN, App. 11a-12a, this Court specifically distinguished the First Amendment issues presented by access claims from the more exacting standards that govern a question of prior restraint. The Court held that the trial court's orders excluding the public and press from a pretrial suppression hearing presented a much different question than that found in a prior restraint case:

> This Court's decision in *Nebraska Press Association v. Stuart* is of no assistance to the petitioners in this case. The Nebraska Press case involved a direct prior restraint by a trial judge on the members of the press, prohibiting them from disseminating information about a criminal trial. Since "it has been generally, if not universally considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication," the

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ers *access* to certain trial documents in a criminal proceeding. In holding that the news media do not have any First Amendment right of access, the court emphasized that "the trial judge here did not resort to the use of prior restraints despite the case being much publicized," 558 F.2d at 1208, and instead "employed reasonable 'remedial measures,' far short of prior restraints ...." *Id.* at 1211.

> Court held that the order violated the constitutional guarantee of a free press. The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access.

443 U.S. at 393 n.25 (citations omitted). *See also id.* at 399 (Powell, J. concurring)[12] (excluding all members of the public "does not in any way tell the press what it may or may not publish . . . .").

2. By Issuing a Telecast Ban Without Any Evidence of Harm to Noriega, the District Court Failed to Apply This Court's Prior Restraint Standards.

Rather than "examine the evidence," as *Nebraska Press* directs, 427 U.S. at 562, to determine whether the Order would be effective and whether other alternatives might protect Noriega's rights, the District Court relied on a series of speculative inferences and possibilities — that because CNN had apparently obtained a taped conversation between Noriega and one of Mr. Rubino's employees, it may have possessed tapes of other unspecified conversations between Noriega and his defense team; that this unspecified information was proba-

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[12] Likewise, in *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980), also cited by the Court of Appeals, App. 7a, Justices Brennan and Marshall, in their concurring opinion, recognized that "[t]he Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information," *id.* at 586, and that its access decisions hold "only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Id.* at 585. Governmental efforts to restrain communication, however, are wholly different: "When so employed against prior restraints, free speech protections are almost insurmountable." *Id.* at 587.

bly protected by Noriega's attorney-client privilege, although Noriega had executed a release acknowledging that his prison telephone conversations would be intercepted and recorded by Government agents; and that these possibly privileged communications, if disclosed either to the Government (which was responsible for the taping) or to the public, might reveal statements or other information that could hamper Noriega's Sixth Amendment right to a fair trial.

By relying on speculation rather than fact,[13] the District Court ignored the teaching of *Nebraska Press*, which emphatically rejected the notion that a prior restraint could be supported by speculative concern that some harm will occur as a result of publication.[14] Although *Nebraska Press* found that the trial judge was "justified" in finding that a sensational murder trial would generate "intense and pervasive pretrial publicity" which "might impair the defendant's right to a fair trial," it held such a conclusion was "of necessity speculative" because it dealt with "factors unknown and unknowable." 427 U.S. at 562-63. Where the evil that is sought to be prevented is purely speculative, a judge cannot constitutionally impose a ban upon publication:

> Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the

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[13] The Government contended that the prior restraint was necessary to preserve the status quo because neither the court nor Noriega knew what tapes CNN possessed. App. 84a-85a. "But to maintain the status quo means to forbid publication while a hierarchy of courts . . . speculates on the likelihood of adverse effects from publication and their magnitude. Linde, *Courts and Censorship*, 66 *Minn. L. Rev.* 171, 201 (1981) (footnote omitted).

[14] This principle was reaffirmed by *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), in which the Court held that a "sweeping restraint order" issued in a class action was an abuse of discretion and recognized that "the mere possibility of abuses does not justify routine adoption of a communications ban." *Id.* at 104.

> probability that it would do so here is not demonstrated with the degree of certainty our cases on prior restraint require.

Id. at 569.

The District Court's determination that it was "impossible to determine . . . the precise extent to which Noriega's right to a fair trial would be hampered by disclosure" thus cannot justify a prior restraint under *Nebraska Press*. App. 23a. In fact, the court compounded the constitutional error condemned by *Nebraska Press*. In *Nebraska Press*, the information that was sought to be restrained was known to be of the most highly prejudicial content — that the defendant had actually confessed to the crime — and speculation as to the *effects* of this plainly prejudicial information was held insufficient to support a prior restraint. Here, by contrast, the District Court speculated not only as to the effects of the information restrained, but also as to its content.[15]

a. In Allowing CNN to be Enjoined, The Courts Below Improperly Shifted the Burden of Proof Mandated by This Court's Prior Restraint Cases.

With any prior restraint, the party seeking to censor speech must bear the heavy burden of justifying such a draconian remedy. *Nebraska Press*, 427 U.S. at 557-59; *Southeastern*

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[15] The Court of Appeals further compounded the District Court's error by deferring to the District Court's speculations rather than conducting the searching inquiry of the record required by the principles stated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Thus, the Court of Appeals simply insisted that the trial court must be "accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial," App. 7a, thereby granting Noriega's speculative Sixth Amendment concerns absolute primacy, and ignored critical evidence that Noriega may have waived his right to insist that his prison conversations be deemed confidential.

Promotions, Ltd., 420 U.S. at 559; *New York Times Co. v. United States*, 403 U.S. at 714; *Freedman v. Maryland*, 380 U.S. 51 (1965). The District Court reversed this burden of proof by requiring CNN to come forward with the tapes and prove that they contained no prejudicial information. App. 23a-24a.

Thus, the District Court's reversal of the burden of proof is squarely at odds with this Court's decisions recognizing the heavy presumption against the constitutionality of prior restraints and the heavy burden to justify prior restraints. In effect, the District Court required CNN to come forward with evidence to persuade it *not* to impose "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559. When the burden of proof is placed where it should be, on the proponent of the prior restraint, the District Court's orders cannot stand.

b. The Courts Below Also Ignored Petitioners' Vital First Amendment Interest in Reporting on the Noriega Prosecution and on Allegations of Government Misconduct.

The Noriega prosecution is a public event in which a United States District Court will be adjudicating drug charges against a former head of a sovereign state.[16] The fact that CNN seeks to telecast information about alleged Government misfeasance in a major criminal case involving the deposed Panamanian leader, who was apprehended and brought to Miami as a result of the United States' invasion, suggests that more First Amendment protection, not less, should be accorded its right to publish what it has learned. *Butterworth v. Smith*, 110 S. Ct. 1376, 1381 (1990) ("publication of information relating

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[16] In 1988, the District Court concluded that "Noriega is a fugitive. The court has no expectation that he will be brought into the jurisdiction to answer the charges against him." *United States v. Noriega*, 683 F. Supp. 1373, 1373 (S.D. Fla. 1988).

to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment.").

As this Court has recognized, the First Amendment "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). Freedom of the press includes the right "to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). And, as the Court noted in *Nebraska Press*, 427 U.S. at 559, "the protection against prior restraints should have particular force as applied to reporting of criminal proceedings."[17] The Court of Appeals, by rejecting this Court's prior restraint requirements, failed even to consider alternatives other than a ban of CNN's telecasts of the Noriega tapes.

c. By Contrast, the Speculative Interests Advanced by Noriega Do Not Justify a Prior Restraint on CNN.

At the core of Noriega's applications for a restraint on publication was what he described as "the duty to ensure that attorney-client conversations are not revealed without the consent of the client." Answer to Appellant's Emergency Motion to Vacate Prior Restraint at 5. According to Noriega, the right to communicate privately with counsel is of constitutional dimension and cannot be endangered regardless of what the tapes contained. App. 31a. Not only is Noriega's characterization of the privilege inaccurate, but even if it were correct, a

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[17] Unfortunately, the District Court's injunction has produced its "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." *Bridges v. California*, 314 U.S. 252, 268 (1941).

prior restraint could not serve to salvage his interest in confidentiality.

First, the privilege does not derive from an accused's constitutional right to an attorney.[18] Nor is the protection afforded the privilege absolute or unconditional, as it hinders the search for truth. *See* 8 Wigmore, *Evidence* § 2291, at 554.[19] Thus, while the federal courts and most states have codified the common law privilege in their evidentiary rules, a testimonial privilege is not a talisman that may be used to overrule the First Amendment's fundamental purpose of preventing prior restraints.

Second, regardless of the strength of Noriega's claim of privilege or what conversations are on the CNN tapes, no prior restraint could serve to salvage his interest in confidentiality. As the District Court recognized, "[t]hat purpose ... has already been frustrated by the very fact of invasion," and thus the restraint, at least as to this alleged purpose, was merely "symbolic and prophylactic." App. 20a-21a; *see, e.g., Smith v.*

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[18] *Maness v. Meyers*, 419 U.S. 449, 466(1975); *United States v. Talley*, 790 F.2d 1468, 1470-71 (9th Cir.) *cert. denied*, 479 U.S. 866 (1986); *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985). Instead, it is a creature of the common law. *See* 8 Wigmore, *Evidence* § 2290 (McNaughton rev. 1961) (modern-day privilege derived from a policy seeking to encourage full and frank discussion between client and lawyer).

[19] *See also, United States v. Pipkins*, 528 F.2d 559, 562-63 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976) ("The attorney-client privilege ... is not a broad rule of law which interposes a blanket ban on the testimony of an attorney ... [and] does not embrace everything that arises out of the existence of an attorney-client relationship."); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981) (the tension between the policies behind the privilege and full disclosure "requires a rule of construction that the privilege is to be construed 'no more broadly than is necessary to effectuate its purpose.'") *quoting Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480 (E.D. Pa. 1978); *In re Grand Jury Subpoena*, 406 F. Supp. 381, 385 (S.D.N.Y. 1975) ("[T]he attorney-client privilege both serves and disserves the administration of justice.").

Daily Mail Publishing Co., 443 U.S. 97 (1979) (overturning gag order because it could not be effective); *Nebraska Press*, 427 U.S. at 562 (in considering whether to issue prior restraint, court should determine "how effectively a restraining order would operate to prevent the threatened danger"). It is the Government's interception of Noriega's prison conversations that has frustrated Noriega's claim to privilege, not CNN's actions in telecasting information about possible Government misconduct.[20]

The District Court also issued its orders in the face of substantial evidence that any attorney-client privilege that may have existed had been waived and, indeed, CNN submits that any conversations that it telecast were not privileged at the time of telecast.[21] Certainly under *Nebraska Press*, a litigant seeking to restrain the media must demonstrate the "gravity of the evil" with sufficient probability to justify the extraordinary

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[20] *See Weatherford v. Bursey*, 429 U.S. 545 (1977) (effect on defendant's Sixth Amendment rights of Government interception of attorney-client conversations). The District Court steered a somewhat uncertain course on its concern with Noriega's attorney-client privilege. Initially noting its distaste for revealing "the defendant's trial strategy and protected confidences," the court acknowledged that the damage already had been done because of the Government's decision to tape Noriega's conversations and that the purpose for protecting confidences "has already been frustrated by the very fact of invasion." App. 20a. As a result, the District Court was left only with a concern about "prevent[ion] [of] disclosure of information damaging to the defendant's case . . . ." App. 21a. But that interest can be protected through simpler, and far less intrusive, alternatives such as sequestration of the prosecution.

[21] Noriega's calls were made after he signed a waiver and was informed that his conversations would be monitored. App. 77a-78a, 141a-146a. *See Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-30 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Moreover, Noriega's counsel listened to certain conversations in the presence of CNN's personnel and discussed them in general on air. This may also constitute a waiver. *See, e.g., In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987).

protection of a prior restraint. 427 U.S. at 569. Yet, although the Government took the position that Noriega's calls had been monitored with his consent and the District Court agreed "that's an issue," the court nevertheless took the extraordinary step of restraining CNN, stating "it's kind of beside the major point that we're here about." App. 93a.[22]

d. The Courts Below Also Failed to Consider Alternatives to a Ban on Publication.

Neither the District Court nor the Court of Appeals abided by the standards of *Nebraska Press*, which requires a court to consider whether there exist viable alternatives to the prior restraint. The First Amendment bars any consideration of a prior restraint if measures short of an order restraining publication will adequately protect the defendant's interest in a fair trial. *Nebraska Press*, 427 U.S. at 551-55, 563-64. The failure of the courts below to address the alternatives available is reason enough alone to reverse their decisions.

Any harm to Noriega's ability to obtain a fair trial as a result of disclosure to the prosecution could be prevented by

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[22] The District Court isolated as a second interest Noriega's desire to prevent disclosure of his trial strategy and tactics. App. 21a. Whether or not any harm would come to the defense strategy from telecast of the tapes is entirely speculative: there was no evidence produced to demonstrate any adverse consequences that might occur. Although both the District Court and Eleventh Circuit placed the blame for this dearth of information on CNN, that characterization misses two essential points. First, it was Noriega's burden, not CNN's, to demonstrate the existence of harm, and placing the obligation on CNN to justify publication disregards settled constitutional doctrine. *See, e.g., Southeastern Promotions, Ltd.*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58. Second, the suggestion that CNN has "shackled the District Court" is simply wrong. App. 16a. In fact, it was Noriega who declined to present the explanation of trial-strategy that would make the tapes meaningful, and the District Court agreed that "apparently no one is going to understand what those tapes are about.". App. 81a.

requiring the Government to institute steps to avoid being tainted by any information that is telecast. *See, e.g., United States v. Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988). This alternative places the burden where it belongs.[23]

To combat the perceived risk of prejudicial publicity tainting the jury pool, the usual and effective measures of a careful jury selection, judicial instruction, continuance, and sequestration are readily at hand.[24] *Nebraska Press*, 427 U.S. at 551-55; *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966). As a result, the District Court was wrong when it stated that it required knowledge of the contents of the tapes in CNN's possession prior to judging the appropriateness of a prior restraint.[25]

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[23] If Noriega's conversations were taped illegally, a branch of the Government — the Bureau of Prisons — appears responsible. If the goal is to keep that illegality from tainting another branch of Government — the prosecutors — the burden should be on the Government, not the member of the news media that uncovered the allegedly illegal activities, to cure it. There was no evidence presented by Noriega or by the Government that such alternatives would not work, only a suggestion that obtaining tapes from CNN would be "more efficient." App. 27a.

[24] Nor was there any showing that alternatives could not be devised to avoid or limit the effects of prejudicial publicity that might arise from CNN's telecast of the Noriega tapes. The District Court itself seemed to recognize this after it opined that "[t]he impartial jury aspect of it has already been dealt with in Nebraska [Press] . . . ." App. 74a. Even so, the court failed to consider the numerous alternatives to prior restraint that are readily available in this case.

[25] Meanwhile, both the District Court and the Court of Appeals suggested that it was "entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record." App. 27a n.1. There was no basis in the record for these suggestions. They were speculation, hardly sufficient to justify the orders the District Court issued or its refusal to consider such alternative measures as making the Government provide it with the tapes in its possession.

C. The District Court Injunction Further Violates CNN's First Amendment Rights By Its Vagueness.

The District Court injunction was unconstitutionally vague. As this Court stated in *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968), any restraint on First Amendment freedoms "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate." Thus, government must pursue its goals "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 637 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Such "precision" was absent here. With the District Court formulating an injunction that does not precisely specify the proscribed speech and the Court of Appeals expanding the scope of the prior restraint to potentially reach telecast of tapes not even including attorney-client communications, the rulings below have forced CNN "to defend [its] good faith, at the risk of a contempt citation," as it continues covering this major story. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103 n.17 (1981). The proceedings below graphically illustrate the risk to CNN. The District Court recently warned, "I cannot permit a news organ to come before me and say, we have some information that we're going to publish." App. 118a. And, as the Court of Appeals noted, "the restraint . . . could arguably be read to embrace the news report about the recordings as well as the recordings themselves." App. 5a.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND OF VARIOUS STATE SUPREME COURTS, WHICH HAVE ADOPTED *NEBRASKA PRESS* STANDARDS IN EVALUATING PRIOR RESTRAINTS

Because the decisions below conflict with this Court's prior restraint cases, it is not surprising to find that they also conflict with the decisions of the other courts of appeal and of various state supreme courts, all of which have properly applied the prior restraint rules stated in *Nebraska Press*. Under Rule 10.1(a), this Court should issue a writ of certiorari to correct the decision below.

A. By Refusing to Apply Prior Restraint Standards, The Court of Appeals' Decision Directly Conflicts With Decisions of Other Circuits.

In *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983), the Ninth Circuit vacated an order restraining CBS from broadcasting government surveillance tapes generated in the investigation of John DeLorean, noting that since *Nebraska Press* "federal and state appellate courts have held without exception that trial court restraints on the reporting of judicial proceedings failed to meet the requirements set forth in" that case. *Id.* at 1178. While acknowledging the enormous publicity surrounding the DeLorean trial and the possibility that prospective jurors who viewed the investigation tapes might "harbor preconceptions that would threaten Mr. DeLorean's right to trial by an impartial jury," the court found DeLorean's showing too speculative to warrant a prior restraint. *Id.* at 1180. And notwithstanding those circumstances, Mr. DeLorean was acquitted.

Similarly, despite a claimed threat to Fourth Amendment rights, the First Circuit vacated a finding of criminal contempt against the *Providence Journal* for publication of illegally obtained wiretaps about a deceased mobster. *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed*, 485 U.S. 693 (1988). Applying *Nebraska Press*, the court held, among other things, that the Fourth Amendment "could [not] conceivably support the restraint against publication." *Id.* at 1349.[26]

The District Court's Order directing CNN to turn over the tapes at issue also conflicts with the decisions of other courts of appeal. In *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.), the Ninth Circuit vacated a district court order requiring NBC to produce a copy of a movie based on the

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[26] Other federal appellate decisions, including several within the past year, have also recognized that a prior restraint cannot issue without proof satisfying the *Nebraska Press* standards. *See, e.g., In re Charlotte Observer*, No. 90-5912, slip op., at 6 (4th Cir. Nov. 6, 1990) (unpublished opinion) (vacating oral injunction prohibiting disclosure of name of attorney who had been inadvertently identified as a target of ongoing grand jury investigation: "once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction."); *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) (vacating injunction restraining broadcast of scenes allegedly obtained by illegal surreptitious surveillance); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir.), *cert. denied*, 59 U.S.L.W. 3247 (U.S. 1990) (vacating order restricting broadcast of minor's description of alleged sexual abuse); *Hunt v. NBC*, 872 F.2d 289 (9th Cir. 1989) (rejecting injunction based on claim that a docudrama's portrayal of a murder conviction might prejudice a trial on a second murder); *Rifkin v. Esquire Publishing, Inc.*, 7 Media L. Rep. (BNA) 1231 (9th Cir. 1981) (rejecting claim for "so grave a step" based on protection of individual privacy).

On the other hand, those appellate decisions have been required because a growing number of trial courts apparently have forgotten the rule against prior restraints. The Court should act to ensure this trickle does not become a torrent.

notorious insolvency of the Equity Funding Corporation.[27] The purpose of the production order, which was issued in a suit by a former officer of Equity Funding, "was to determine whether or not to issue an injunction suspending its broadcast." 584 F.2d at 906. The court recognized that the order to produce the film suffered from the same constitutional deficiencies as the request to enjoin the broadcast:

> A broadcaster or publisher should not . . . be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt.

Id. at 907.

Indeed, the decision of the Court of Appeals in this case departs so far from existing federal precedent that it is also in direct conflict with the case law that was established by its predecessor, the Fifth Circuit.[28] Thus, in *Bernard v. Gulf Oil*

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[27] Similarly, a district court dismissed an order to show cause issued against CBS for a contempt citation when it refused to produce copies of an upcoming episode of "60 Minutes" so that a court could determine whether its broadcast should be enjoined. *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983). This case arose out of the criminal prosecution of seven New Orleans police officers whose counsel learned that CBS intended to broadcast a story on the events underlying the charges shortly before the trial was to begin. *See also Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1923 (1990) (striking down as prior restraint charitable solicitation statute requiring solicitor to file with state agency copy of script prior to commencement of solicitation).

[28] Furthermore, many of the cases that the Court of Appeals relied upon in upholding the gag order against CNN are by their terms inapplicable to prior restraints. For example, *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988), is cited for the proposition that CNN's First Amendment rights must yield to Sixth Amendment rights. App. 9a. The news agencies in *Dow* appealed an order that restrained extra-judicial

Co., 619 F.2d 459 (5th Cir. 1980) (*en banc*), *aff'd on other grounds*, 452 U.S. 89 (1981), recognizing that "[f]ragile First Amendment rights are often lost or prejudiced by delay," the court ruled that a gag order on communications between class counsel and class members violated the First Amendment. *Id.* at 470. In contrast to the decision of the Court of Appeals, *Bernard* held that neither the "broad management powers" granted by court rules nor the "general authority to regulate the conduct of litigation" can "create an exception to the principles governing prior restraints." *Id.* at 475.[29]

The production order here is no different from those vacated in *Goldblum* and *CBS*. Here, the District Court sought to compel production of source material obtained by CNN in

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speech in a criminal proceeding. The court held that the order, because it was not directed against the press, was not a prior restraint:

> To begin, there is a substantial difference between a restraining order directed against the press — a form of censorship which the First Amendment sought to abolish from these shores — and the order here directed solely against trial participants and challenged only by the press. The distinction is critical. The most offensive aspect of a prior restraint is the censorship involved by forbidding the dissemination of information already known to the press and therefore public.

842 F.2d at 608. Similarly, *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432-433 (5th Cir. 1981) is cited for the proposition that a court must err on the side of protecting a defendant's rights to a fair trial. App. 10a. In *Belo*, broadcasters requested access to audiotape discussion between defendants and FBI agents in connection with the "Brilab" sting operation. The court held that there was no First Amendment right of access to the tapes. Thus, the case did not require the court "to balance 'fair trial' with 'free press' concerns. The 'choice' was rather between an undeniably important but nonconstitutional right of physical access to courtroom exhibits and a defendant's due process right to a fair trial. . . ." *Id.* at 432.

[29] On appeal, this Court affirmed without reaching the First Amendment issues. The Court did note, however, that a proponent of a ban on communications must offer "a particular and specific demonstration of fact." *Gulf Oil Co. v. Bernard*, 452 U.S. at 102 n.16.

the exercise of its First Amendment rights, for the express purpose of determining whether a prior restraint should issue. As the Ninth Circuit explained in *Goldblum*, "[a] procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." 584 F.2d at 907. The First Amendment simply does not permit the District Court to act as a censor and review *in advance* an upcoming telecast.

B. The Decision Below is Also Directly Contrary to State Court Precedents, Which Have Properly Applied This Court's Prior Restraint Decisions.

The decision of the Court of Appeals to abandon sixty years of prior restraint jurisprudence also directly conflicts with an unbroken line of decisions of state appellate courts, which have uniformly held that this Court's prior restraint test must be satisfied before a court may issue a ban on communication.[30] These state court decisions reflect a careful analysis of the First Amendment problems posed by prior restraints and a

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[30] *KCST-TV Channel 39 v. Municipal Court*, 201 Cal. App. 3d 143, 246 Cal. Rptr. 869, 870 (1988) (vacated trial court order which restrained publication of lawfully obtained drawings, stating that "[p]rior restraints on media publications, if permissible at all, are permissible only in the most extraordinary circumstances"); *In Interest of M.B.*, 137 Ill. App. 3d 992, 484 N.E.2d 1154, 1159 (1985) (court struck down protective order restraining news media from publishing names of minors charged with certain crimes, holding that the order went beyond what was authorized by statute and constituted an unlawful prior restraint on the newspaper in violation of the First Amendment: "[t]here is a heavy constitutional presumption against prior restraints on the press"); *Hays v. Marano*, 114 A.D.2d 387, 493 N.Y.S.2d 904 (1985) (relying on *Nebraska Press*, the court struck down a prohibition on the publication of grand jury testimony inadvertently placed in public court file); *State ex rel. Chillicothe Gazette, Inc. v. Court of Common Pleas*, 2 Ohio St. 3d 24, 442 N.E.2d 747 (1982) (determining that the trial court did not consider the factors set forth in *Nebraska Press*, the Ohio Supreme Court held that the trial court erred in enjoining a newspaper from publishing names and addresses obtained in open court).

recognition of the heavy burden that the Constitution imposes on the proponents of all such restraints. *See, e.g., State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353, 363 (1984) (trial court not required to balance fair trial right with media's right to publish); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla. 1976) (rejecting request for prior restraint against news concerning a criminal trial); *State of Israel v. St. Martin's Press*, 560 N.Y.S.2d 450 (App. Div. 1990) (vacating TRO because "[p]laintiff has failed to overcome the heavy presumption against a prior restraint" and "in view of the distribution of the book . . . , any [prior restraint] would be ineffective").

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant their Petition for Certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated this 15th day of November, 1990.

Respectfully submitted,

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NO. 90-

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING, INC.,

Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, P. Cameron DeVore, a member of the Bar of this Court, hereby certify that on this 15th day of November, 1990, three copies of the Petition for Writ of Certiorari in the above-entitled case were personally served upon Frank A. Rubino, Esq., 2601 S. Bayshore Dr., Suite 1400, Coconut Grove, Fla. 33133, counsel for the respondent Noriega herein, and upon Dexter W. Lehtinen, Esq., United States Attorney, and Myles Malman, Esq., Assistant United States Attorney, 155 S. Miami Ave., Miami, Fla. 33130, counsel for the respondent United States of America herein, and upon the Solicitor General,

Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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